Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 | ) | CS Docket No. 96-85 |



# COMMENTS OF U S WEST

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# COMMENTS OF U S WEST

U S WEST, Inc. ("U S WEST") herein provides comments to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM") in the above-captioned action.[1]

## I. INTRODUCTION AND SUMMARY

In this proceeding, the Commission undertakes to implement the cable reform provisions in the Telecommunications Act of 1996 ("1996 Act").[2] As the Commission notes in the NPRM, most of these provisions are clear and self-effectuating.[3] The Commission should endeavor to not overly "interpret" specific provisions of the 1996 Act where the language and legislative intent are essentially clear. Any interpretation made by the Commission should favor and encourage the development

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[1] In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, Order and Notice of Proposed Rulemaking, FCC 96-154, rel. Apr. 9, 1996.

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] NPRM ¶¶ 3, 20, Separate Statement of Commissioner Rachelle B. Chong at 1.

of competition among video programming distributors rather than imposing additional regulation.

Toward that end, U S WEST believes that the Commission should not impose a percent penetration or homes passed requirement for the 1996 Act's new test for effective competition. U S WEST has consistently maintained that such tests do not provide an accurate indicator of the level of competition or the market power of the competitors in a given market. Here, where Congress has not specifically provided for such a test, the Commission should not impose one gratuitously.

The Commission has requested comment on a wide variety of issues. However, U S WEST focuses it comments on three specific areas. First, the Commission has proposed giving franchise authorities 90 days to collect and forward cable programming service tier rate complaints from subscribers. U S WEST believes that time can be cut in half to 45 days. Since the local franchise authority ("LFA") is acting simply as a conduit for rate complaints, 45 days should be sufficient in all cases.

Second, multiple dwelling unit bulk discounts should be offered uniformly within a single complex. The uniform rate should apply regardless of whether the complex is master billed or tenants are billed individually.

Finally, the Commission should amend its prior year losses rules only as they apply to original franchisees. No additional modification is required under the provisions of the 1996 Act.

## II. U S WEST COMMENTS ON ISSUES RAISED IN THE NPRM

### A. The Commission Should Not Impose A Homes Passed Or Subscriber Penetration Percentage Rate For Effective Competition Not Required By The 1996 Act

The 1996 Act provides a new, fourth test to determine if a cable operator is subject to "effective competition" in a given franchise area. Previously, cable operators were deemed subject to effective competition when they met any one of the following three tests:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
>
> (B) the franchise area is--
>
> > (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
> >
> > (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or
>
> (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.[4]

[4] 47 USC § 543(l).

In enacting the 1996 Act, Congress provided in Section 301(b)(3) an additional test for effective competition. This test provides that effective competition is also realized when:

> (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[5]

Thus, franchise areas are now subject to effective competition when a local exchange carrier ("LEC") or its affiliate offers a comparable video programming service directly to subscribers.

The Commission has requested comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition.[6] This request for comment is somewhat puzzling as the express language of the statute does not indicate that a percentage penetration or homes passed test was contemplated by Congress. Indeed, unlike the previous three tests, the new test includes no pass or penetration requirements. Additionally, no

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[5] 1996 Act, 110 Stat. at 115 (§ 301(b)(3)), amending 47 USC § 543(l)(1).

[6] NPRM ¶ 72.

evidence can be found in the legislative history that Congress intended to imply a pass or penetration prerequisite for this fourth test.

Citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,[7] Commissioner Rachelle B. Chong correctly points out in her Separate Statement attached to the NPRM that "[o]nly in cases where there is some ambiguity in the statutory language, should the Commission look to the underlying purpose of the statute for guidance in determining how to interpret the statute."[8] U S WEST agrees with Commissioner Chong that this is not one of those cases. The statutory language is clear. The Commission should not attempt to manufacture ambiguity where none exists. No pass or penetration tests are required by the statute and none should be included in the Commission's Rules implementing it.

As for the proposed definitions of "offer" and "comparable" in the NPRM, U S WEST concurs with the Commission's tentative conclusions.[9] The legislative history of the 1996 Act specifically refers to the Commission's definition of "offer" in 47 CFR Section 76.905(e).[10] Thus, adopting the Commission's definition of "offer" is not seemingly subject to any question or debate. As for "comparable," the Commission has concluded that it should modify its own definition and adopt the language in the legislative history which defines "comparable" as "video programming services [which] include access to at least 12 channels of

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[7] 467 U.S. 837, 843 (1984).

[8] NPRM at Separate Statement of Commissioner Rachelle B. Chong at 2.

[9] Id. ¶¶ 69-73.

[10] Conference Report on S.652 at 170.

programming, at least some of which are television broadcasting signals."[11] U S WEST agrees that this is the proper decision given the specific language provided by Congress. U S WEST also concurs with the Commission that the comparable programming test applies if the LEC or its affiliate is merely a program provider using the facilities of others to deliver programming.

The Commission seeks comment on whether video programming provided by a LEC or its affiliate via multichannel multipoint distribution service ("MMDS") is "comparable" if the subscriber must use an over-the-air antenna to receive local broadcast stations.[12] The Commission also seeks comment on whether or not satellite-delivered broadcast stations (e.g., "superstations") count as broadcast stations for purposes of the 1996 Act.[13] Neither of these issues is entirely clear from the express language of the statute.

In the first instance, U S WEST believes that a LEC-affiliated MMDS provider would have to be offering local broadcast stations as a part of its package of service to meet the definition of "comparable" under the 1996 Act. The offering of local broadcast stations requires more than simply the availability of their signals over-the-air. A broadcast station is not actually "offered" by an MMDS provider unless it takes some affirmative steps to ensure its availability to subscribers. U S WEST believes that an MMDS provider would have to supply equipment to

[11] NPRM ¶ 69 & n.81, citing Conference Report on S.652 at 170.

[12] Id. ¶ 70.

[13] Id.

subscribers for the reception of local broadcast signals to be considered as actually offering such services.

As for superstations being considered television broadcasting signals, U S WEST does not believe that such stations qualify per the language used in the legislative history. In its definition of "comparable," Congress used the term "television broadcast signals."[14] This language implies something significantly different than the term "broadcast channels" as used by the Commission in its NPRM.[15] Congress' use of the term "broadcast signals" indicates that it intended the definition of comparable to include only broadcast stations in their local reception areas. Thus, satellite-delivered superstations would not qualify as "television broadcast signals" outside of their own local broadcast areas.

### B. LFAs Should Have A 45-Day Window In Which To File Subscriber-Based Complaints

The 1996 Act revises the procedure for filing Cable Programming Service Tier ("CPST") rate complaints with the Commission.[16] Under the provisions of the 1996 Act, a subscriber may no longer file a CPST rate complaint directly with the Commission.[17] Instead, subscribers must now file their complaints directly with

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[14] Conference Report on S.652 at 170.

[15] NPRM ¶ 70.

[16] 1996 Act, 110 Stat. at 115 (§ 301(b)(1)), amending 47 USC 543(c).

[17] As such, U S WEST also supports the Commission's determination that the Cable Services Bureau address and telephone number can be removed from monthly bills to subscribers.

their LFA, and such complaints must be received by the LFA within 90 days of a CPST rate increase by the cable operator. The LFA, upon receiving multiple subscriber complaints, is then permitted to file a complaint with the Commission. The Commission has proposed allowing an LFA an additional 90 days in which to file such a complaint.

Allowing LFSs an additional 90-day period to collect the necessary information and file a complaint with the Commission is an inordinate amount of time. Even though the Commission is requiring the LFA to notify the operator and collect the operator's response prior to sending in the complaint (a process which in itself does not seem overly efficient), the LFA is not required to make any decisions other than the decision to file the complaint. The Commission should pare down the time for an LFA to file a complaint to 45 days. This would give the LFA a minimum of 15 days to make its decision, notify the operator, and forward the complaint on to the Commission. This is certainly enough time given the fact that the LFA is acting simply as a conduit. For the benefit of all parties involved, this would reduce the overall complaint filing process time to 135 days from 180 days. In most cases, LFAs will in all likelihood have additional time to process and forward complaints as subscribers are unlikely to file their complaints on the last day of the 90-day period. A 180-day period (more than half a year) just to file a complaint with the Commission is simply too long. It is remarkable that the 180-day period does not even take into account the time the Commission will have to decide the complaint on the merits. Cable operators and complaining subscribers

should not have to live with rate uncertainty for that long. U S WEST urges the Commission to shorten the complaint filing timeframes as recommended herein.

### C. A Single Discounted Rate Should Be Applicable To All Tenants Within A Multiple Dwelling Unit; Tenants Should Have Access To The Offerings Of Competitive Providers

The 1996 Act allows for non-uniform "bulk discounts" to multiple dwelling units (or "MDU") within a franchise area.[18] The Commission requests comment on whether subscribers in a single MDU may receive individually negotiated bulk discounts or whether the same discount must be negotiated with the property owner or manager and applied to all tenants within the MDU.[19] The Commission also requests comments on whether bulk discounts should apply to tenants who are billed by the cable operator individually or if they should apply only in those situations where the discount is deducted from a bulk payment made by the property owner on behalf of the tenants.[20]

U S WEST believes that the Commission should require that all tenants in an MDU receive the same negotiated bulk discount. There is no indication in the language of the 1996 Act or in the legislative history that Congress intended a broader interpretation. Once a bulk discount is established for an MDU, all tenants wishing to subscribe to cable service should receive the same rate. Additionally, the

[18] 1996 Act, 110 Stat. at 115 (§ 301(b)(2)).

[19] NPRM ¶ 98.

[20] Id.

negotiated discount should be applicable to either payment scenario raised by the Commission in its NPRM.[21] It should not matter if the subscriber is billed individually or if the MDU is master billed. An MDU is comprised of the individual units within its bounds. How subscribers are billed is irrelevant to the question of the discount negotiated for the MDU in toto.

A more important issue is tenant access to multiple video programming providers. In many cases, tenants have their provider selections negotiated for them, not always to their liking or in their best interests. Tenants should be allowed to select their own video programming providers where feasible. This would give MDU tenants access to more than one competitive service offering. This additional freedom to select video programming providers would certainly be in the public interest, as competition would provide choices to tenants who previously had few or none.

### D. The Commission Should Modify Its Rules Concerning Prior Year Losses Only As Required By The Specific Language Of The 1996 Act

The Commission requests comment on its tentative conclusion that the statutory requirements of Section 301(k)(1) of the 1996 Act -- concerning the treatment of prior year losses -- is applicable to cable operators filing cost-of-service rate justifications.[22] Although not entirely clear from the NPRM, the Commission seemingly

[21] Id.

[22] Id. ¶ 108.

concludes that the provisions of Section 301(k) are applicable to all cable operators.[23] U S WEST does not believe that this is the case. As the Commission noted in its NPRM, the provisions of Section 301 are limited specifically to the recovery of prior year losses by "a cable system that is owned and operated by the original franchisee of [the] system."[24] In those cases, the statute provides that losses incurred prior to September 4, 1992, "shall not be disallowed, in whole or in part, in the determination of whether the rates . . . are lawful."[25] The statute does not address specifically the contrasting case where the current cable operator is not the original franchisee of the system, nor does it limit the recovery of prior year losses only to the original franchisee. The language contained in Section 301(k) simply requires that such losses not be disallowed for the original franchisee. Otherwise, it is silent.

Once again, the Commission should not attempt to broaden the applicability of the statutory language in the 1996 Act beyond what is expressly provided. While the Commission must modify its rules with regard to original franchisees in accordance with the 1996 Act, it is not required to amend its current rules as applicable to cable operators which acquired their systems by acquisition or purchase. Those rules were appropriately promulgated under extensive rulemaking

[23] Id.

[24] Id. citing 1996 Act, 110 Stat. at 118 (§ 301(k)(1)).

[25] Id.

proceedings and were fully supported by the record.[26] The Commission should not take any action not specifically required by the statutory provisions of the 1996 Act.

## V. CONCLUSION

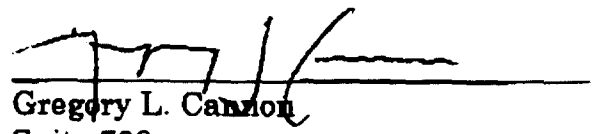
Most of the provisions of the 1996 Act relating to cable reform are unambiguous and self-effectuating. In cases where the 1996 Act is clear, the Commission should not look to create ambiguity to serve its own purposes. Based on that premise, the Commission should not impose a percent penetration or homes passed requirement for the new test for effective competition. In the other areas discussed above, the Commission: 1) should give franchise authorities 45 days to collect and forward cable programming service tier rate complaints from subscribers; 2) should require that multiple dwelling unit bulk discounts be offered uniformly within a single complex with uniform rates applying regardless of whether the complex is master billed or tenants are billed individually; and 3) should not amend it prior year losses rules beyond what is specifically required by the language of Section 301(k). Cable reform, for the most part, is already taken care of by the express language of the 1996 Act. Where direction is required, the Commission should serve

[26] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 2220 (1996).

the overall intent of Congress in making these reforms and favor competition over the imposition of additional regulation.

Respectfully submitted,

U S WEST, INC.

By: 

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# CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 4th day of June, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST** to be served via hand-delivery, upon the persons listed on the attached service list.

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